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No. 04-698

Supreme Court, U.S
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In The
Supreme Court of the United States

BRIAN SCHAFFER, a minor by his parents and next friends, JOCELYN and MARTIN SCHAFFER,

Petitioners,

v.

JERRY WEAST, Superintendent of Montgomery County Public Schools, and the BOARD OF EDUCATION OF MONTGOMERY COUNTY, MARYLAND,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA AND TWELVE OTHER STATES AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

JERRY W. KILGORE
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

MAUREEN RILEY MATSEN
Deputy State Solicitor General

CARLA R. COLLINS
ERIC A. GREGORY
COURTNEY M. MALVEAUX
RONALD N. REGNERY
D. MATHIAS ROUSSY, JR.
Associate State Solicitors General

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436
(804) 371-0200 (facsimile)

Counsel for the Commonwealth of Virginia

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[Additional Counsel Listed On Inside Of Cover]

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TROY KING
Attorney General
Office of the Attorney General
Alabama State House
11 South Union Street,
Third Floor
Montgomery, Alabama 36130
(334) 353-3915

TERRY GODDARD
Attorney General
State of Arizona
1275 West Washington
Phoenix, Arizona 85007-2926
(602) 542-3333

THOMAS J. MILLER
Attorney General of Iowa
Office of the
Attorney General of Iowa
1305 E. Walnut, Hoover
Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-4419

G. STEVEN ROWE
Attorney General of Maine
State House Station 6
Augusta, Maine 04333
(207) 626-8800

THOMAS F. REILLY
Attorney General
of Massachusetts
Office of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
Supreme Court Building
207 West High Street
Jefferson City, Missouri 65101
(573) 751-3321

MIKE MCGRATH
Attorney General of Montana
Office of the Attorney General
P.O. Box 201401
Helena, Montana 59620-1401
(404) 444-2026

Attorney General
BRIAN SANDOVAL
Office of the Attorney General
Department of Justice
100 North Carson Street
Carson City, Nevada 89701
(775) 684-1112

PATRICIA A. MADRID
Attorney General
of New Mexico
Office of the Attorney
General of New Mexico
407 Galisteo
P.O. Drawer 1508
Santa Fe, New Mexico
87504-1508

JIM PETRO
Attorney General
Office of the
Attorney General of Ohio
State Office Tower
30 E. Broad Street, 17th Fl.
Columbus, Ohio 43215
(614) 466-8980

MARK L. SHURTLEFF
Utah Attorney General
Utah State Capitol Complex
East Office Bldg., Suite 320
Salt Lake City, Utah
84114-2320
(801) 538-9600

DARRELL V. MCGRAW, JR.,
Attorney General
of West Virginia
Office of the Attorney General
State Capitol, Room 26-E
Charleston, West Virginia 25305
(304) 558-2021

QUESTION PRESENTED

Under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1450, when parents of a disabled child and a local school district reach an impasse over the child's Individualized Education Program, either side has a right to bring the dispute to an administrative hearing officer for resolution. At the administrative hearing, which side has the burden of proof – the parents or the school district?

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INTEREST OF AMICI

The Commonwealth of Virginia, Commonwealth of Massachusetts, and the States of Alabama, Arizona, Iowa, Maine, Missouri, Montana, Nevada, New Mexico, Ohio, Utah and West Virginia ("States") receive federal funds under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1450 ("IDEA"). Consistent with the IDEA, the States require their local school districts to work to provide a free and appropriate public education for every disabled child in the school district. *See* 20 U.S.C. § 1412. Because every child is different, the school districts, in consultation with the disabled child's parents, must develop an Individualized Education Program ("IEP") for each disabled child. *See* 20 U.S.C. § 1412(a)(2). On occasion, the parents and the school district disagree on the content of the IEP. In those instances, either the parents or the school district may seek an administrative hearing. *See* 20 U.S.C. §§ 1414(a)(1)(D)(ii)(II), 1415(f). At the hearing, either the school district or the parents must bear the burden of proof. Unfortunately, the IDEA is silent on the issue of which side bears the burden of proof.

In urging this Court to grant the Petition, the States ask this Court to resolve the issue of which side bears the burden of proof in an administrative hearing. Quite simply, there must be a single national rule on this issue. As described below, the lack of a uniform rule has practical consequences, leads to inconsistent results within the same State, and inhibits interstate mobility.

However, in this brief, the States do not express an opinion on *how* the question should be resolved. If certiorari is granted, some States may file a brief arguing that the school districts should bear the burden of proof. Other States may file a brief contending that the parents should

bear the burden of proof. Still other States may decline to take a position on the issue. Nevertheless, at this time, the States simply are saying that this Court should agree to decide the issue.

SUMMARY OF ARGUMENT

The States' argument in favor of granting the Petition is threefold.

First, there is a deep and serious conflict among the Circuits. This conflict has enormous practical consequences. This deep and serious conflict on an issue of federal law is, by itself, sufficient reason for this Court to grant a Writ of Certiorari. Moreover, given that virtually all of the Circuits have addressed the issue, there is no possible benefit to deferring resolution of the question to a later time.

Second, the lack of uniformity leads to conflicting results within the same State. When IEP litigation takes place in state court, there is a risk that state courts will not follow Circuit precedent. Moreover, in those Circuits where there is no binding authority, the district judges are free to decide the issue as they see fit. The only way to avoid these conflicting results is for this Court to establish a uniform rule that is binding in both the state and the federal courts.

Third, the lack of uniformity inhibits the ability of citizens to relocate from one State to another State. In some cases, families may be swayed not to make moves, that are otherwise attractive to them, for fear of losing IDEA rights available to them in the Circuit where they reside. In other cases, families may be pressured into

making moves, when they would prefer to remain in place, in order to leave Circuits where their IDEA rights are less than optimal. Both sorts of pressure are undesirable.

ARGUMENT

I. THERE IS A DEEP AND SERIOUS CONFLICT AMONG THE CIRCUITS.

As noted by the Petition, there is a deep and serious split in the Circuits on the issue of allocating the burden of proof. Four Circuits – the Fourth, Fifth, Sixth, and Tenth – place the burden of proof on the parents. *See Weast v. Schaffer*, 377 F.3d 449, 456 (4th Cir. 2004); *Doe v. Board of Education of Tullahoma City*, 9 F.3d 455, 458 (6th Cir. 1993); *Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990); *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153, 1158 (5th Cir. 1986).[1] In contrast, six Circuits – the Second, Third, Seventh, Eighth, Ninth, and the District of Columbia – place the burden of proof on the school district. *See Beth B. v. Van Clay*, 282 F.3d 493, 496 (7th Cir.), *cert. denied*, 537 U.S. 948 (2002); *Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 658 (8th Cir. 1999); *E.S. v. Independent School District No. 196*, 135 F.3d 566, 569 (8th Cir. 1998); *Walczak v. Florida Union Free School District*, 142 F.3d 119, 122 (2nd Cir. 1998); *Clyde K. v.*

[1] At first blush, it appears that *Alamo Heights* stands for the proposition that the party seeking to change the IEP must bear the burden of proof. However, as explained in more detail at page 19 of the Petition for Certiorari, other language in *Alamo Heights* mandates that the school district's view be presumed correct. Thus, the parents in the Fifth Circuit always bear the burden of proof.

Puyallup School District No. 3, 35 F.3d 1396, 1398 (9th Cir. 1994); *Oberti v. Board of Education*, 995 F.2d 1204, 1207 (3rd Cir. 1993); *McKenzie v. Smith*, 771 F.2d 1527, 1534 (D.C. Cir. 1985) (citation omitted). Indeed, only two Circuits – the First and Eleventh – have not addressed the issue.[2] *But cf. T.B. ex rel. N.B. v. Warwick School Cmte.*, 361 F.3d 80, 82 n.1 (1st Cir. 2004) (Stating in dicta that the school district always bears the burden of proof.). *Devine v. Indian River County Sch. Bd.*, 249 F.3d 1289, 1292 (11th Cir. 2001) (once an initial IEP is in place, the burden of proof is on the party that wishes to change the IEP).[3] As a result of this split, substantially different rules apply depending upon the State in which the dispute over the IEP arises. In eighteen States, the burden is placed on the parents.[4] Conversely, in twenty-five other States and the District of Columbia, the burden is placed on the school district.[5]

This conflict has enormous practical consequences. Although the IDEA is a single statute of nationwide

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[2] Because of the limited nature of the Federal Circuit's jurisdiction, 28 U.S.C. § 1295, the Federal Circuit cannot rule on the issue.

[3] Although *Devine* did not address the issue of who bears the burden of proof in a disagreement over an initial IEP, its holding is at odds with the broad language used by the Fourth Circuit, which appears to place the burden on the parents in all cases. *See Weast*, 377 F.3d at 456 ("[W]e hold that parents who challenge an IEP have the burden of proof in the administrative hearing.").

[4] States where the burden is placed on the school district include Alaska, Arkansas, Arizona, California, Connecticut, Delaware, Hawaii, Idaho, Indiana, Illinois, Iowa, Missouri, Minnesota, Montana, Nebraska, Nevada, New Jersey, New York, North Dakota, Oregon, Pennsylvania, South Dakota, Vermont, Washington, and Wisconsin.

[5] States where the burden is placed on the parents include Colorado, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, New Mexico, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming.

application, compliance with that statute may be easier for some States than others – both financially and otherwise – based on the judicial Circuit in which they lie. In the 3,000 or so administrative hearings held each year under the IDEA, the role played by the burden of proof is self-evident. *See* Government Accounting Office, *Report to the Ranking Minority Member, Comm. On Health, Education, Labor and Pensions* 29 (Sept. 2003) (reporting 3,020 administrative hearings held in 2000). However, the significance of the burden goes far beyond these hearings. More than 6.5 million students have IEPs in place. *Id.* at 29-30. Each IEP is the result of a statutorily mandated process in which parents have a right to participate as well as a right to appeal any decision by the school district not to accommodate their requests. Knowledge that parents will bear the burden of proof, if no agreement can be reached, gives school districts in some Circuits a more advantageous posture than their counterparts in Circuits where the school district must bear that burden.

This clear split among the Circuits on an important issue of federal law is, by itself, sufficient reason for this Court to grant certiorari. Moreover, given that virtually all of the Circuits have addressed the issue, there is no possible benefit to deferring resolution of the question to a later time. Any decision by the First or Eleventh Circuit likely will simply track the reasoning of one of the other ten Circuits to address the issue. Certiorari should be granted.

II. THE LACK OF UNIFORMITY LEADS TO INCONSISTENT RESULTS WITHIN THE SAME STATE.

The lack of a uniform national rule designating which party bears the burden of proof leads to inconsistent results *within the same State*.

First, the decision of an administrative hearing officer may be appealed to either a state court of competent jurisdiction or a federal district court. 20 U.S.C. § 1415(i)(2)(A). However, decisions of the Circuits interpreting federal law are *not* binding authority in state courts within those Circuits. *See United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075-76 (7th Cir. 1970) (Explaining that "decisions of [the Supreme Court] on national law have binding effect on all lower courts whether state or federal," but that "because lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts."). Thus, for example, the Virginia courts could disregard *Weast* and hold that the school district bears the burden, but the federal courts in Virginia are bound by *Weast*. The issue of who bears the burden of proof should not depend upon whether the appeal is filed in state court or federal court.

Second, there are seven States where there is no binding Circuit authority for the federal courts.[6] If a case is brought in federal court in one of these States, the district judge will decide.[7] Because the decisions of one district judge are not binding on other district judges, there is a distinct possibility of inconsistent results. For example, in a decision favorable to the school district, a judge of the District of Massachusetts ruled that "[t]he burden of proof *at all times* lies with Plaintiffs." *Douglas W. v. Greenfield Public Schools*, 164 F. Supp. 2d 157, 164 (D. Mass. 2001) (emphasis added). Yet, in a decision

[6] These seven states are Alabama, Florida, Georgia, Maine, Massachusetts, New Hampshire, and Rhode Island.

[7] Of course, if the case is brought in state court, the issue will be controlled by whatever state court authority exists, if any.

favorable to parents, a *different* judge of the *same* court ruled that "the burden must rest with the [school officials] to show, by a preponderance of the evidence, that [the school district's] IEP provides [the child] with a 'free appropriate public education.'" *Lang v. Braintree School Committee*, 545 F. Supp. 1221, 1228 (D. Mass. 1982).[8] Thus, the choice of law in any given case in a State without binding Circuit authority may well depend upon which judge is assigned.[9]

The only way to prevent conflicts within the same State is for this Court to render a decision which is binding on all state and federal courts. Certiorari should be granted.

III. THE LACK OF A UNIFORM RULE HINDERS INTERSTATE MOBILITY.

This Court has "long recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Saenz v. Roe*, 526 U.S. 489, 499 (1999) (citation and internal quotation marks omitted). In deciding where to place the burden of proof in IDEA cases, neither the majority rule nor the minority rule – standing alone – implicates this important principle of federalism. However, the principle is most decidedly implicated by the *conflict* between the two rules.

[8] The result in *Lang* is especially noteworthy because the district court imposed the burden on the school district even though it had prevailed at the administrative level.

[9] Of course, since the District of Massachusetts rendered these decisions, the First Circuit has declared, in dicta, that the school district always bears the burden. *See T.B.*, 361 F.3d at 82 n.1.

Because of the split in the Circuits, parents in some States have less rights under the IDEA than their counterparts in other States. Or, stated differently, school districts in some States have less demanding duties than the school districts in other States. Where a child suffers from a severe disability – or, perhaps, even a moderate one – these differences can predictably impact family decisions about whether to take up residence in another State.

Two examples illustrate the problem. First, suppose a family with a disabled child lives in Phoenix, Arizona, where, under *Clyde K.*, the burden of proof is on the school district. If the family were to move to Santa Fe, New Mexico to pursue better economic prospects, *Johnson* mandates that the parents would have the burden of proof. Thus, the parents would face a significant reduction in their rights under the IDEA if they were to make the move from Arizona to New Mexico. This fact may well inhibit the exercise of their constitutionally protected right to change their State of residence.

Second, suppose a family with a disabled child lives in Youngstown, Ohio, where, under *Tullahoma City*, the parents bear the burden of proof. Although comfortably settled in Youngstown and wishing to remain there, the parents may well be advised to pull up stakes and move to Pittsburgh, Pennsylvania, where, under *Oberti*, the school district bears the burden. Because the school district bears the burden, it may be easier for parents to obtain improved services for their child. Such a situation is likely to be troublesome to both the parents and their new school district. The parents may resent feeling compelled and forced to move in order to take full advantage of a federal law. School officials may also be concerned by the additional strain that such migration may impose upon their systems. Moreover, those left behind

– families without the means or opportunity to relocate – may understandably resent the unequal treatment that their disabled children receive as the result of this conflict.

All parents want what is best for their disabled children and for the entire family. The issue of whether the parents or the school district bear the burden of proof in an IEP administrative hearing should not be a factor in deciding whether to move to another State. A decision from this Court resolving the issue would eliminate it as a factor. Certiorari should be granted.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be GRANTED.

Respectfully submitted,

JERRY W. KILGORE
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

MAUREEN RILEY MATSEN
Deputy State Solicitor General

CARLA R. COLLINS
ERIC A. GREGORY
COURTNEY M. MALVEAUX
RONALD N. REGNERY
D. MATHIAS ROUSSY, JR.
Associate State Solicitors General

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436
(804) 371-0200 (facsimile)

Counsel for the Commonwealth of Virginia

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